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Nurzalyeni Aryssha bt Razali v Public Prosecutor

B HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO WA-42S-5–06 OF 2023
MUNIANDY KANNYAPPAN J
7 APRIL 2025

C *Criminal Law — Offences — Child Act 2001 ss 31(1)(a) and 31(4) — Neglect of child — Mother neglected three-year old child — Mother left child in condominium unit — Child fell to death — Mother found guilty, convicted for offence and sentenced accordingly*

D *Criminal Procedure — Appeal — Appeal against conviction and sentence — Offence under s 31(1)(a) of the Child Act 2001 — Neglect of child — Accused left child unattended in condominium unit resulting in child's death from fall — Whether conviction and sentence safe*

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The accused was mother to the victim, a three-year-old girl, was charged for an offence under s 31(1)(a) of the Child Act 2001 ('the Act'). It was alleged that the accused had left the victim all alone without supervision of an adult, causing the victim to have fallen from the balcony on the 18th floor of the condominium and died. The incident occurred while the accused away with her partner ('Azlan') at the shop. The accused's husband ('SP3') ceased living with the accused and the victim since March 2020. The victim was under the care of the accused. SP5 testified that the accused had been staying in the said unit and occupied the bedroom ('bedroom I') beside the balcony area with Azlan and the victim. In her defence, the accused admitted having left the victim alone sleeping in the room on the night of the incident, but allegedly ensured the balcony door was locked. She further alleged that SP5 was not speaking the truth, thus she was not a credible witness, and she had a motive to fabricate evidence against her. The sessions court judge ('the SCJ') found the accused guilty and sentenced the accused to a period of five years imprisonment from the date of conviction. In addition to that, pursuant to s 31(2)(a) of the Act , the accused was also ordered to execute a bond of good behaviour for a period of three years with one surety with an amount of RM3,000 as security. Dissatisfied with the decision of the SCJ, on the finding of guilty, conviction and sentence, the accused appealed.

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Held, dismissing the appeal, affirming the conviction and sentence:

(1) If only the accused had ensured the sliding door to the balcony was closed and an adult including her to be with the child at the material time, the

child would not have fallen and died. Thus, the death of the child was a direct result from the accused's neglect, as a mother. Moreover, as a mother of the child, she was liable in law to maintain and care for her child but instead left her alone at the condominium unit. The law pursuant to s 31(4) of the Act, deemed that the accused had neglected her own child whom had fallen from a height and died. Her neglect was inexcusable in law, as it was within her resources to provide care for her own child, but she had failed to do so (see para 21).

(2) The SCJ was correct to find the accused's testimony to be inconsistent and lacking in credibility, as she had failed to provide a reasonable explanation as to how the victim could have access to the balcony, and succumb to a fall from a great height, albeit her claim that the balcony door was locked. Finding by the SCJ was fortified by his decision that the accused did not provide any evidence to support her allegation that SP5 had a motive to fabricate evidence against her. Furthermore, the alleged fabrication of evidence by SP5 was never an ingredient to be proven by the prosecution for an offence under s 31(1)(a) of the Act, and the accused was never absolved of her responsibility to take care of her child, with no excuse. Blaming it on SP5, did bode well as a defence, as she was the mother to the child, whereas SP5 was in fact a total stranger to her child. Therefore, the SCJ was correct in arriving at the ultimate decision that the prosecution had proven a case against the accused beyond reasonable doubt, that the accused had neglected her own child who had succumbed to a fall from a great height and died (see para 21).

(3) There had not been any error, thus the conviction entered against the accused was safe. Further, the sentence of five years imprisonment to take effect from the date of conviction; a good behaviour bond imposed on the accused for a period of three years with a deposit amount of RM3,000 and also an order for community service for an aggregate of 36 hours to be completed within a period of six months upon expiration of her prison term, was in accordance with law and established judicial principles. In its entirety, the accused had to pay for her negligent misconduct as a life was lost, her own child, because of her criminal behaviour pursuant to the Child Act 2001. Therefore, the accused was ordered to serve her sentence accordingly. Nevertheless, a stay of execution of the sentence was granted for the accused to have a final redress at the Court of Appeal (see paras 30–31).

[Bahasa Malaysia summary

Tertuduh merupakan ibu kepada mangsa, seorang kanak-kanak perempuan berusia tiga tahun, yang telah dituduh di bawah s 31(1)(a) Akta Kanak-Kanak 2001 ('Akta tersebut'). Pertuduhan terhadap tertuduh adalah kerana meninggalkan mangsa tanpa pengawasan orang dewasa, yang mengakibatkan mangsa terjatuh dari balkoni tingkat 18 sebuah kondominium dan meninggal

dunia. Kejadian itu berlaku ketika tertuduh keluar bersama pasangannya ('Azlan') ke sebuah kedai. Keterangan menunjukkan bahawa suami tertuduh ('SP3') tidak lagi tinggal bersama tertuduh dan mangsa sejak Mac 2020, dan jagaan mangsa berada sepenuhnya di bawah tanggungjawab tertuduh. Saksi pendakwaan kelima ('SP5') memberi keterangan bahawa tertuduh menetap di unit tersebut dan menduduki bilik tidur bersebelahan balkoni ('bilik tidur I') bersama Azlan dan mangsa. Dalam pembelaannya, tertuduh mengakui bahawa pada malam kejadian, dia meninggalkan mangsa bersendirian tidur di dalam bilik, tetapi mendakwa pintu balkoni telah dikunci. Dia seterusnya mempertikaikan keterangan SP5, dengan mendakwa bahawa saksi tersebut tidak boleh dipercayai serta mempunyai motif untuk memberikan keterangan palsu terhadapnya. Setelah menimbangkan keterangan yang dikemukakan, hakim mahkamah sesyen ('HMS') mendapati tertuduh bersalah atas pertuduhan dan menjatuhkan hukuman penjara lima tahun bermula dari tarikh sabitan. Selain itu, menurut s 31(2)(a) Akta tersebut, tertuduh turut diperintahkan melaksanakan bon berkelakuan baik untuk tempoh tiga tahun dengan seorang penjamin dengan jaminan sebanyak RM3,000. Tidak berpuas hati dengan keputusan HMS tersebut mengenai sabitan dan hukuman, tertuduh telah memfailkan rayuan ini.

Diputuskan, menolak rayuan, mengekalkan sabitan dan hukuman:

(1) Sekiranya tertuduh memastikan pintu gelangsar balkoni ditutup dan seorang dewasa, termasuk dirinya, berada bersama mangsa pada masa material, kejadian mangsa terjatuh dan meninggal dunia tidak akan berlaku. Oleh itu, kematian mangsa merupakan kesan langsung daripada kelalaian tertuduh sebagai seorang ibu. Tambahan pula, sebagai ibu kepada mangsa, tertuduh bertanggungjawab di sisi undang-undang untuk memelihara dan menjaga anaknya, namun sebaliknya telah meninggalkan mangsa bersendirian di unit kondominium tersebut. Undang-undang melalui s 31(4) Akta tersebut memperuntukkan bahawa tertuduh telah cuai dalam penjagaan anaknya, yang akhirnya terjatuh dari tempat tinggi dan meninggal dunia. Kelalaian tersebut tidak dapat dimaafkan di sisi undang-undang, tertuduh bertanggungjawab untuk menyediakan penjagaan sewajarnya kepada anaknya, tetapi dia telah gagal berbuat demikian (lihat perenggan 21).

(2) HMS adalah betul dalam mendapati keterangan tertuduh tidak konsisten serta tidak mempunyai kredibiliti memandangkan tertuduh gagal memberikan penjelasan munasabah bagaimana mangsa boleh masuk ke balkoni dan terjatuh dari tempat tinggi, walaupun dia mendakwa pintu balkoni telah dikunci. Dapatan HMS turut diperkuatkan dengan keputusannya bahawa tertuduh tidak mengemukakan sebarang keterangan bagi menyokong dakwaannya bahawa SP5 mempunyai motif untuk mereka-reka keterangan terhadapnya. Tambahan pula, dakwaan berhubung pemalsuan

keterangan oleh SP5 bukanlah merupakan satu unsur yang perlu dibuktikan oleh pihak pendakwaan bagi kesalahan di bawah s 31(1)(a) Akta tersebut dan tertuduh tidak pernah dilepaskan daripada tanggungjawabnya untuk menjaga anaknya tanpa sebarang alasan. Menyalahkan SP5 juga tidak boleh dijadikan pembelaan kerana tertuduh adalah ibu kepada mangsa, manakala SP5 hanyalah seorang yang langsung tidak mempunyai sebarang kaitan dengan mangsa. Oleh yang demikian, HMS adalah betul dalam membuat keputusan muktamad bahawa pihak pendakwaan telah berjaya membuktikan kes terhadap tertuduh melampaui keraguan munasabah, bahawa tertuduh telah cuai terhadap anak kandungnya sehingga mangsa terjatuh dari tempat tinggi dan meninggal dunia (lihat perenggan 21).

(3) Tiada sebarang kekhilafan telah dilakukan, justeru sabitan terhadap tertuduh adalah selamat. Selain itu, hukuman penjara lima tahun yang diperintahkan untuk berkuat kuasa dari tarikh sabitan; bon berkelakuan baik yang dikenakan terhadap tertuduh bagi tempoh tiga tahun dengan jaminan berjumlah RM3,000; serta perintah khidmat masyarakat selama 36 jam secara keseluruhan yang perlu dilaksanakan dalam tempoh enam bulan selepas tamat hukuman penjara, adalah selaras dengan undang-undang serta prinsip kehakiman yang telah mantap. Secara keseluruhannya, tertuduh perlu menanggung akibat daripada salah lakunya yang cuai kerana kehilangan nyawa telah berlaku, iaitu anak kandungnya sendiri, berpunca daripada perlakuan jenayahnya menurut Akta Kanak-kanak 2001. Oleh yang demikian, tertuduh telah diperintahkan untuk menjalani hukumannya sebagaimana ditetapkan. Walau bagaimanapun, penangguhan pelaksanaan hukuman telah dibenarkan bagi memberi ruang kepada tertuduh untuk mendapatkan pengadilan terakhir di Mahkamah Rayuan (lihat perenggan 30–31).]

Cases referred to

PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
R v Ipelee 2012 SCC 13, SC (refd)

Legislation referred to

Child Act 2001 s 31(1)(a), (2)(a), (4)
Criminal Procedure Code s 173(f)(ii), (h)(i), (m)(ii)

Sunderasan Krishnan (Lakshmi Gandhi Nathan & Partners) for the appellant.
Aqilah Ishak (Public Prosecutor, Attorney General's Chambers) for the respondent.

Muniandy Kannyappan J:

PREFACE

[1] The appellant to this appeal is Nurzalyeni Aryssha bt Razali who was the accused at the trial before the sessions court. She had faced an amended charge which reads as the following:

> Bahawa kamu pada 16.04.2022 antara jam lebih kurang 1.00 pagi hingga 2.15 pagi, di Blok B-18–12, PV 10, Platinum Lake Condominium, No.2, Jalan Danau Saujana 2, Taman Danau Kota, 53300 Setapak, Kuala Lumpur dalam Daerah Wangsa Maju, di dalam Wilayah Persekutuan Kuala Lumpur sebagai orang yang mempunyai hak pemeliharaan terhadap seorang kanak-kanak perempuan yang bernama xxx, No. MyKid:180917–13–0378 berusia 3 tahun didapati telah mengabaikan dengan secara cuai kanak-kanak tersebut sehingga menyebabkan kematiannya. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 31(1)(a) Akta Kanak-Kanak 2001 dan boleh dihukum di bawah peruntukan yang sama.

[2] She had claimed trial to the above amended charge. At end of the case for prosecution, the sessions court judge ('SCJ') had decided that the prosecution succeeded in proving a prima facie case for the preferred charge against the accused and ordered her to enter on defence. Consequently, she testified on oath as a witness. No other witness was called testify on her behalf.

[3] At conclusion of the trial, it was decided that the accused had failed to raise a reasonable doubt on case of the prosecution, which was water tight. Following to that, it was decided by the SCJ that the prosecution has proven a case against the accused premised on the amended charge beyond reasonable doubt. Hence, she was found guilty and convicted on the charge for an offence under s 31(1)(a) of the Child Act 2001 (Act 611).

[4] Upon hearing submission made by counsel for the accused as plea in mitigation and by the deputy public prosecutor ('DPP') on the aggravating factors applicable to the facts and circumstances of the case, the accused was sentenced to a period of five years imprisonment, which is to take effect from the date of conviction. In addition to that, pursuant to s 31(2)(a) of Act 611, she was also ordered to execute a bond of good behaviour for a period of three years with one surety, who is a citizen of Malaysia with an amount of RM3,000 as security. Further, the SCJ had also ordered for the accused to undertake community service for 36 hours in aggregate within the period of six months after having served her sentence of imprisonment. However, this court was informed on the date of decision of this appeal by counsel for the appellant/accused that she had already undertaken the community service ordered by the sessions court.

[5] Being dissatisfied with the decision of the SCJ, on the finding of guilty, conviction and sentence, the accused had appealed to this court against it. A

PROSECUTION NARRATIVE

[6] A total of 11 witnesses were called by the prosecution to prove its case against the accused. The accused is mother to the victim, child K, as named in the amended charge. The accused and her husband Mohd Muzammil bin Mustaqim ('SP3') were lawfully married on 27 December 2018. But the victim was born on 17 September 2018, before their wedlock. After marriage, SP3 lived together with the accused and the victim in Johor and Selangor. He ceased living with the accused and the victim since March 2020. He had explained, since March 2020 the victim was under the care of the accused. It was confirmed by SP3 that the child victim is as in the photos exhibited as evidence P4(1) to (79), who had since deceased. He too had identified the accused during the trial. B C D

[7] SP3 knew that the child had passed away on 16 April 2022 and he was informed she fell from the 18th floor at PV10, Platinum Lake Condominium, Taman Danau Kota, Setapak, Kuala Lumpur. He had further confirmed, the victim was in the custody and care of the accused, and not living with them at that material time. E

[8] The unit at the condominium at Blok B-18–12, PV10, Platinum Lake Condominium, No 2, Jalan Danau Saujana 2, Taman Danau Kota, Setapak was rented by Nurul Nadzirah Izzati bt Mohd Sufri ('SP4'), since 1 May 2021. Her mother, Juriah bt Bujang ('SP5') has been staying in that unit with her sons Mohd Shahrul Azlan ('Azlan') and Child A and her grandchild Child F. Pursuant to the tenancy agreement, P10, the period of tenancy for the said unit was from 1 May 2021 to 1 May 2023. F G

[9] SP5 had testified that the accused was the female partner of her son, Azlan. She had elaborated that mid-February in the year 2022, the accused had come to her house together with the child victim. She thought it was only for a visit, but it turned out they stayed overnight. SP5 did ask the accused as to why she didn't want to go home, to which her retort was, fearful of her stepfather who had hit her. Thereon, the accused and the victim continued to live in the said unit together with SP5 and her children. H

[10] It was elaborated further by SP5, that the unit has four bedrooms (rough sketch of the unit exhibited as P11). The main room, which is marked 'F' is the bedroom of SP5, her son Aiman and grandchild, Child F. Another bedroom marked as 'I' is the bedroom of her other son Azlan, the accused and the victim. The said bedroom is beside the balcony area at the unit. I

[11] On the fateful day, 16 April 2022, at around 1am, SP5 and Azlan went to a shop to buy medicine for Aiman, who was unwell having fever. The accused had decided to follow them to the shop, also to buy 'Kool Fever' to treat her child (the victim) who was also unwell having fever. When they left to the shop, SP5 left her child Aiman who was, four years old and her grandson, Child F who was six years old at the main room 'F'. The accused decided not to take the victim together with but instead left her in the bedroom 'I'. SP5 had testified that the accused had told her, the victim was sleeping and she had ensured the sliding door to the balcony was locked.

[12] SP5 then testified, whilst en route to the shop, Azlan had received a phone call from his friend who had informed him that the victim had fallen from the upper floor of the condominium PV10. On receiving the call, all of them returned to the unit at the condominium immediately. Upon arrival, Azlan and the accused went to the place where the victim was found.

[13] When SP5 entered the unit, she found the sliding door at the balcony was open. According to her, who had been living at the unit, the sliding door had three leaf doors and it was the one far right that was opened, leaving space about one feet, wherein an adult could pass through in order to go to the balcony. It would have been easier for the victim to do so, as she was a child, small in size.

[14] Sergeant Mohd Nadzeri bin Md Nawi, SP7 who was attached as a police officer at the Setapak Police Station, was informed of the case. Together with the driver and photographer they went to the locus in quo. When they arrived, SP7 saw a child lying down at the tar area near parking lot at condominium PV10. SP7 also saw the head of the child was bleeding. He then placed a *tali rintangan* and contacted the Officer in Charge of the Setapak Police Station ('OCS'), who had then ordered SP7 to contact the forensic unit for further action.

[15] The forensic team arrived and pursued with investigation. They handed over the dead body of the child victim to SP7 to be sent to Hospital Kuala Lumpur ('HKL'). Upon arriving at HKL, SP7 filled up a Form POL61 (P15) for a post mortem to be conducted in order to ascertain the cause of death of the child victim.

[16] Nur Hanin bt Zainal Abidin ('SP2'), a Forensic Medical Officer at HKL, had conducted the post mortem on 16 April 2022 at 2.15pm. It was ASP Rohaini bt Baharom ('SP11') who had informed SP2 that the dead body was in fact the child victim, Child K. The post mortem revealed wounds on the body of the victim which were consistent with injuries inflicted from a fall from a height. SP2 then opined, cause of death was multiple injuries consistent with

fall from a height. The post mortem report which was prepared by SP2 was tendered during the trial as exh P5. For completeness, SP11 was investigating officer ('IO') of the case, who was attached to D11 — *Bahagian Siasatan Seksual Wanita dan Kanak-Kanak, Ibu Pejabat Polis Kontinjen (IPK) Kuala Lumpur*, who was informed of the incident on 16 April 2022 at about 5.25am by another police officer who was attached to the Setapak Police Station, which was reported vide Setapak Police Report No 5099/22 and tendered in court as P3.

[17] P3 is the first information report ('FIR') made by SP1, L/Kpl Mohd Izzat Hisyamuddin who was attached to the *Pusat Kawalan Ibu Pejabat Polis Daerah (IPD) Wangsa Maju*. It states, while SP1 was on duty on 16 April 2022, he received a call from SP9, a security guard Nor Amirul Syahidi bin Mokhtar who was working at condominium PV10 Setapak, of the incident involving a child who had fallen down. Upon investigation, SP11 had found out that since early January 2022, Azlan had been on a relationship with the accused and after a month into the relationship, he brought the accused and the child victim to live together with him at the condominium unit, as the accused had nowhere else to go after moving out from her house.

[18] Pertaining the fall incident on 16 April 2022, SP11 found that the child victim who was sleeping in the bedroom 'I' was left all alone, and when she woke up, she went out of the door and headed towards the balcony area. At the balcony, she had played and later fell. It was also concluded by SP11 that the accused had left the victim all alone without supervision of an adult, causing the victim to have fallen from the balcony at the 18th floor of the condominium and died. It was further concluded that the accused had neglected her child when she left her all alone, while she was away with Azlan to the shop.

LEGAL POSITION

[19] The duty of the trial judge, when deciding if the prosecution has made out or proved a prima facie case against the accused, comprising credible evidence free from reasonable doubt, it has to embark on a maximum or overall evaluation of the evidence adduced by the prosecution witnesses ('PWs'). It consists of the testimony of PWs during examination in chief ('EIC') and later cross-examined by counsel for the accused, followed by re-examination. After having considered, credibility of the said witnesses; reliability of their evidence; if the court is satisfied all ingredients of the offence particularised in the charge against the accused has been proven by the prosecution, then the accused would be ordered to enter on her defence pursuant to s 173(h)(i) of the Criminal Procedure Code ('the CPC/Act 593') If it fails to do so, the accused would be acquitted of the charge, pursuant to s 173(f)(ii) of the CPC. In the

present case, the accused was ordered to defend herself, since the prosecution had offered credible evidence proving each ingredient of the offence if unrebutted or unexplained would warrant a conviction. The credible evidence adduced was also reliable, free from reasonable doubt and not like the proverbial *cow jumping over the moon.*

[20] The preferred charge against the accused is for an offence under s 31(1)(a) of Act 611, which reads as:

> 31 Ill-treatment, neglect, abandonment or exposure of children
>
> (1) any person who, being a person having the care of a child —
>
> (a) abuses, *neglects*, abandons or exposes *the child in a manner likely to cause him physical* or emotional *injury* or causes or permits him to be so abused, neglected, abandoned or exposed;
>
> ...
>
> commits an offence and shall on conviction be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding ten years or to both.
>
> ...
>
> (4) *a parent* or guardian or other person *legally liable to maintain a child shall be deemed to have neglected him in a manner likely to cause him physical* or emotional *injury if, being able to so provide from his own resources, he fails to provide adequate* food, clothing, medical or dental treatment, lodging or *care for the child.*
>
> (5) a person *may be convicted of an offence* against this section *notwithstanding* that —
>
> (a) ...
>
> (b) *the child in question has died.* (Emphasis added.)

Juxtaposing the preferred charge against s 31(1)(a) of Act 611, the ingredients of the offence which has to be made out or proved by the prosecution are:

(a) the victim is a child;

(b) the accused has care over the victim during the date and duration of time period specified in the charge; and

(c) at the material time of care by the accused, the child victim, was neglected until it has caused her death.

[21] On a curial scrutiny of the evidence adduced by the PWs, the SCJ was correct in arriving at the finding that a prima facie case has been made out pursuant to proof offered by the prosecution, in respect of the following ingredients:

(a) *the victim is a child.*
It is clearly so, as Child K, was a child of three years old, according to P28, her birth certificate. This piece of evidence was not rebutted, thus deemed admitted;

(b) *the accused had care over the victim during the date and duration of time specified in the preferred charge against her.*
This ingredient too has been proven.
Perusing the amended charge, on the date 16 April 2022 and duration of time period between 1am to 2.15am, pursuant to the testimony of SP5, since mid-February 2022, the accused and victim came to the unit where she was living at the condominium, to stay with her and her sons and grandson. It was also confirmed by her that the accused was living in with her son Azlan as his female partner with her child, in the room 'I' at the said unit.
Further, since March 2020, SP3 the former husband of the accused, had confirmed, it was the accused whom had the care and custody of her child turned victim in the present case. Therefore, it is apparent pursuant to their testimony, the child victim was under the care and custody of the accused at the material time specified in the charge, before the child died.

(c) *the accused had neglected the child and the neglect had caused the child physical injury.*
Easing back into the facts and circumstances of the case, the accused as the mother of the child, Child K had custody and care of her. Again, testimony by SP5 has established beyond doubt that the accused left the victim alone in the room, before she went out with her and Azlan to the shop. It is also a fact that the sliding door to the balcony was left opened, and her child was able to go through it before she fell off from the 18th floor of the condominium. Falling of the child and her death was confirmed in the post mortem report P5, that she died after succumbing to multiple injuries arising out of the fall from height. If only the accused had ensured the sliding door to the balcony was closed and an adult including her to be with the child at the material time, the child would not have fallen and died. Thus, the death of the child was a direct result from her neglect, as a mother. Moreover, as a mother of the child, she is liable in law to maintain and care for her child but instead left her alone at the condominium unit at the wee hours of the morning. The law pursuant to s 31(4) of the Act 611, deems that she had neglected her own child whom had fallen from a height and died. Her neglect is inexcusable in law, as it is within her resources to provide care for her own child, but she had failed to do so, at the material time. Life of the child could have been saved, if she did not leave the unit with Azlan to the shop. Even, if it is true that she wished to acquire 'Kool Fever' for her child, she could have gotten Azlan or SP5 to obtain it for the child. If she would have done that, a life could have been saved. But, instead she neglected her

role to care for her own child who was of tender years, by leaving her alone at the condominium unit at the material time. A child in that circumstance would be likely to have wandered helplessly to look for her mother, until she walked out of the room 'I' to the balcony, and fell off from a great height.

In her defence, she had testified under oath that on the night of the incident, she admitted to have left the victim alone sleeping in the room but allegedly ensured the balcony door was locked. She claims not to have left the balcony door open. She had alleged SP5 was not speaking the truth, thus she is not a credible witness and she had a motive to fabricate evidence against her. Further, she had testified, she had always taken good care of her child and loved her very much. She turned out shocked and grieved after the incident. No other witness was called by her to testify on her behalf in order to support or bolster her defence. It is reckoned that her testimony is bizarre, as it is her child who was left all alone, when she ought to have been with her all the time and not left unattended. As to whether the balcony door was left closed or opened, is a risk she had taken, as human mind fails due to forgetfulness wherein, at times even after having locked the door allegedly, it may have been left open. To that extent she cannot blame SP5, who has no blood relationship with her nor the child to have ensured the balcony door was closed. The law pursuant to Act 611 demands for the accused as the mother to take care of her own child, come *rain or shine* as it is her responsibility. It is for a reason Act 611 was enacted, as prior to the enactment, incidences of this nature go unpunished, when in the past such incidences are not a normal. But later due to decadence in values, cases of child abandonment, abuse do occur regularly, hence the promulgation of Act 611.

On the above footing and juxtaposing with the evidence adduced by the PWs, the SCJ was correct to find her testimony to be inconsistent and lacking in credibility, as she had failed to provide a reasonable explanation as to how the victim could have access to the balcony, and succumb to a fall from a great height, albeit her claim that the balcony door was locked. Finding by the SCJ was fortified by his decision that the accused did not provide any evidence to support her allegation that SP5 had a motive to fabricate evidence against her. Furthermore, the alleged fabrication of evidence by SP5 is never an ingredient to be proven by the prosecution for an offence under s 31(1)(a) of the Act 611, and the accused is never absolved of her responsibility to take care of her child, with no excuse. Blaming it on SP5, does not bode well as a defence, as she is the mother to the child, whereas SP5 was in fact a total stranger to her child.

In terms of the law, finding by the SCJ is congruent with the meaning of the word 'neglect' in s 31(1)(a) of Act 611 which should be given its ordinary meaning, including failure to take reasonable care of a child.

Element of likelihood of physical or emotional injury is satisfied if the neglect creates a risk of such injury, like in the present case, for reasons alluded to above. The degree of neglect must be such that it exposes the child to a significant risk of harm, also on all fours with the present case. Flowing from the above findings of fact by the SCJ and the position of law applicable to the proved facts and circumstance of the case, he was obviously correct in arriving at the ultimate decision that the prosecution has proven a case against the accused beyond reasonable doubt, that she had neglected her own child who had succumbed to a fall from a great height and died.

SENTENCE

[22] On the issue of meting out an appropriate sentence according to law, Act 611 had neatly stipulated the various sentence to be meted out on the accused on proof of guilt beyond reasonable doubt after having considered her plea in mitigation and submission on aggravating factors advanced by the DPP. In that respect, the SCJ had ably and painstakingly considered with much appropriateness the following valuable factors:

(a) gravity of the offence;

(b) the loss of a young life;

(c) the need to deter others who are like minded to commit similar offences; and

(d) personal circumstances of the accused and her remorse.

The SCJ had also acknowledged the need for rehabilitation and deterrence in sentencing, hence the imposition of five years imprisonment, which is proportionate to the offence. Further she was ordered to execute a bond of good behaviour bond for a period of three years with a surety and security of RM3,000 and finally a 36 hours term of community service to be undertaken by her upon completion of incarceration. The aim of meting out such gamut of sentences, foremost is to ensure the aim of specific and general deterrence in sentencing is fulfilled and also rehabilitation of the accused so that she could reintegrate back into society, swiftly. The sentence meted out, especially the period of imprisonment would also serve as general deterrence to parents and caregivers of their responsibility to protect children.

IS THE CONVICTION SAFE

[23] The true test in this appeal before this court, to justify appellate intervention is, if the conviction entered on the accused safe. If it is so, this court in its exercise of appellate jurisdiction, would not interfere with the

findings of fact, application of the law and the ultimate decision of guilt, conviction and sentence. A safe conviction would entail the following:

(a) accurate reflection of the factual truth of what had transpired in the case;

(b) the evidence presented by the prosecution is no exaggeration but a genuine proof of the accused's guilt;

(c) there has been no doubt raised on the accuracy of the forensic evidence, reliability of the testimony of all PWs; and

(d) the integrity of the legal process involving the accused is also intact, wherein her rights to a fair trial was protected throughout the investigation, trial and sentencing. Moreover, the accused had legal representation during the trial (and also at hearing of the appeal) throughout, especially so when all PWs were cross-examined.

[24] Therefore, the conviction was obtained via adherence to the law and procedure. The other contributing factors to the safe conviction are:

(a) strong and credible evidence;

(b) reliable circumstantial evidence; and

(c) sufficient to prove guilt of the accused beyond reasonable doubt.

IS THE SENTENCE FAIR, JUST AND APPROPRIATE

[25] As for the sentence meted out, it anchors on a sentence according to law pursuant to s 173(m)(ii) of the CPC, wherein it is in accord with the penal provision and established judicial principles (see the oft quoted authority of *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315). The composite sentences meted out are appropriate, fair, just and proportionate to the commission of the offence by the accused (see by analogy the persuasive decision by the Supreme Court of Canada in *R v Ipelee* 2012 SCC 13). The accused as the mother of the child victim, is expected under the law not to neglect her at all times, but to take care of her like the proverbial *menatang minyak yang penuh.*

CONCLUSION

[26] It is settled law on criminal appeals, that the test for sustainability of a conviction recorded against the accused by the trial court, is ultimately for the appeal court to determine and decide if the conviction recorded is safe. To reiterate, the finding of guilty and conviction of the accused is safe, as the findings of fact and the law applied to the facts and circumstances of the case is correct and parallel to the evidence adduced in the case. In that respect, the charge against the accused is pivotal and all evidence adduced corresponds with it.

[27] Easing back to facts of the case, in a nutshell, the following are apparent:

(a) the case involves a child of the accused who had fallen from a height from the unit she lived in;

(b) it happened past midnight;

(c) the mother of the child, who is the accused was away from home by leaving the child without any adult care;

(d) her explanation was that she had to go out to acquire some medication for her child who was unwell;

(e) when she had returned she found that the child had walked out of the room in which she was sleeping to the balcony which was widely opened and she fell off from the 18th floor, hence the death falling from a greater height;

(f) the fact remains that the accused as the mother very well chose to leave the child alone with two other children without any adult care but now blamed SP5 for keeping the balcony door open;

(g) she as the mother of the child has a duty and responsibility to ensure safety of the child who was of tender years and helpless, needing care and attention at all times;

(h) this is the rationale of the law under which the accused was charged for an offence under s 31(1)(a) of the Child Act 2001;

(i) but by leaving the child alone, hoping that all will be safe and sound without her constant care and supervision is a pure neglect on her part; and

(j) the law expects her to take care of her child and watch her like a hawk at all times, without any single moment of neglect.

[28] Arguments were raised on the preferred charge, stating it was flawed as it does not correspond with the provision of the law. Viewing the charge and juxtaposing it with the legal provision, it is manifestly obvious that the actus reus specified in the charge, 'mengabaikan dengan secara cuai' is consistent with s 31(1)(a) of the Child Act 2001 which provides for the actus reus of the offence — 'mengabaikan atau bertindak secara cuai'. Hence 'mengabaikan dengan secara cuai' would expressly envelope itself with the actus reus 'mengabaikan'. That renders the charge not being flawed but correct and valid in law as both the actus reus and mens rea of the offence under s 31(1)(a) is specified clearly. Moreover, as the accused was legally represented during the trial, and the accused was able to advance her defence to the preferred charge, she was not prejudiced.

A **[29]** From the evidence adduced; the findings made by the trial judge; the law applied to the facts and circumstances of the case; it is abundantly clear that the SCJ has not misdirected himself necessitating an appellate intervention. Furthermore, the findings made are on facts, which are consistent with the evidence adduced, thus it is not incongruent justifying appellate intervention. B The net result is that the offence has been proved beyond reasonable doubt against the accused and the trial judge did not leave room for any error of fact or law, as his judgment is sound, speaking and very well written.

C **[30]** On that score, I find that there has not been any error, thus the conviction entered against the accused is safe. On the sentence meted out, it is also according to law, fair, just and appropriate in terms of the facts, circumstances and criminality of the accused. Thus, the sentence of five years imprisonment to take effect from the date of conviction; a good behavior bond imposed on the accused for a period of three years with a deposit amount of D RM3,000 and also an order for community service for an aggregate of 36 hours to be completed within a period of six months upon expiration of her prison term, is in accordance with law and established judicial principles. In its entirety, the accused has to pay for her negligent misconduct as a life is lost, her own child, because of her criminal behavior pursuant to the Child Act 2001.

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[31] Therefore, the appeal by the accused is dismissed and she is ordered to serve her sentence accordingly. I have granted a stay of execution of the sentence for the accused to have a final redress at the Court of Appeal, being the ultimate tier of appeal against the finding of guilty, conviction and sentence by F the SCJ.

Appeal dismissed, conviction affirmed.

G *Appeal dismissed, conviction and sentence affirmed.*

Reported by K Selvaraju

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